STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	**)**	
Request for Regulatory Determination filed by the CALIFORNIA ASSESSORS' ASSOCIATION concerning property tax exemption policies issued by the STATE BOARD OF EQUALIZATION[1]	**)**	**2000 OAL Determination No. 6**
	)	**[Docket No. 99-008]**
	)	**March 13, 2000**
	)	**Determination pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: **DAVID B. JUDSON**
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SYNOPSIS

The Office of Administrative Law has concluded that the following Board of Equalization *Assessors' Handbook* provisions are "regulations" which are invalid because they should have been, but were not, adopted pursuant to the Administrative Procedure Act: (1) interpretation of the property tax exemption concerning multispecialty medical clinics and (2) interpretation of the property tax exemption concerning property used by religious organizations for residential purposes. After the request for determination was filed, the Board adopted the second policy as a regulation pursuant to the Administrative Procedure Act.

DECISION [2, 3, 4, 5, 6]

The Office of Administrative Law ("OAL") has been requested to determine whether two policies of the Board of Equalization are "regulations" which must be adopted pursuant to the Administrative Procedure Act ("APA").[7] The challenged policies involve:

1) Property tax exemptions for multispecialty medical clinics; and

2) Property tax exemptions for religious property used for residential purposes.

The Office of Administrative Law finds that:

1) The APA is generally applicable to the Board of Equalization;

2) The Board of Equalization has issued or utilized policies which have general applicability and make specific the terms of the California Revenue and Taxation Code;

3) No general exceptions to the APA requirements apply to the challenged policies;

4) The policies established by the Board of Equalization, except those parts which restate existing law, are invalid unless adopted as regulations pursuant to the APA.

REASONS FOR DECISION

I. AGENCY, REQUEST FOR DETERMINATION

The State Board of Equalization ("Board") was created by former Article XIII, section 9 of the California Constitution of 1879. Language establishing the Board is currently found in the California Constitution, Article XIII, section 17. The Board is charged with administering numerous tax programs, including the collection of property and sales taxes, for the support of state and local governmental activities. The Board also has major responsibilities in providing rules and regulations governing property taxes.[8]

Request for Determination

On February 16, 1999, Bruce Dear, Assessor of Placer County, filed a request for determination on behalf of the California Assessor's Association ("CAA"). The CAA challenged two unrelated policies found in a document entitled *Assessors' Handbook Section 267; Welfare, Church, and Religious Exemptions* (October 1998) promulgated by the State Board of Equalization ("Assessors' Handbook" or "Handbook"). The two policies pertain to property tax exemptions for:

1) Multispecialty medical clinics; and

2) Property used by religious organizations for residential purposes.[9]

OAL published a summary of this request for determination in the California Regulatory Notice Register. Prior to the time OAL invited public comment on this request, the Church of Jesus Christ of Latter-Day Saints petitioned the Board to adopt or amend a regulation pertaining to tax-exempt status for housing used by religious organizations.[10]

The Board responded by taking steps to formally adopt as a regulation Property Tax Rule 137 – "Application of the Welfare Exemption to Property Used for Housing."[11] OAL approved this regulation for final adoption and filing with the Secretary of State on December 13, 1999.

The Board then filed a response to CAA's request.[12]

While the Board's action in adopting its welfare exemption regulation is the appropriate course of action, the regulation pertains to only one of the two policies which are the subject of this determination. The Board's regulation does not, however, address the property tax exemption for multispecialty medical clinics. Despite the Board's action, the issue of whether the policy contained in the Assessors' Handbook concerning residential use of religious property is a "regulation" subject to the APA is one that will be addressed. Accordingly, the basis for OAL's determination is set forth below.

II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE BOARD?

Government Code section 11000 states:

> "As used in this title [Title 2. 'Government of the State of California' (which title encompasses the APA)], 'state agency' includes every state office, officer, department, division, bureau, *board*, and commission. [Emphasis added.]"

The APA narrows the definition of "state agency" from that in section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."[13] The Board is in neither the judicial nor legislative branch of state government.

Clearly, the Board is a "state agency" within the meaning of the APA.

III. DOES THE BOARD'S ENABLING LEGISATION IMMUNIZE ITS HANDBOOK FROM REVIEW UNDER THE APA?

The Board raises an issue about a possible conflict between the APA and its enabling legislation which is found in Government Code section 15606. That section gives the Board the authority to:

> "(a) Prescribe rules for its own government and for the transaction of its business;
>
> (b) Keep a record of all its proceedings.
>
> (c) Prescribe rules and regulations to govern local boards of equalization when equalizing, and assessors when assessing, ...
>
> (d) Prescribe and enforce the use of all forms, for the assessment of property for taxation, including forms to be used for the application for reduction in assessment.
>
> (e) Prepare and issue instructions to assessors designed to promote uniformity throughout the state and its local taxing jurisdictions in the assessment of property for the purposes of taxation. It may adapt the instructions to varying local circumstances and to differences in the

character and conditions of property subject to taxation as in its judgment is necessary to attain this uniformity.

* * * *

(g) Prescribe rules and regulations to govern local boards of equalization when equalizing and assessors when assessing with respect to the assessment and equalization of possessory interests.

(h) Bring an action in a court of competent jurisdiction to compel an assessor or any city or county tax official to comply with any provision of law, or any rule or regulation of the board adopted in accordance with subdivision (c), governing the assessment or taxation of property. . . ."

Pursuant to section 15606, subdivision (c), the Board has adopted regulations which are found in Title 18 of the California Code of Regulations. The Board has also issued "instructions" to the county assessors utilizing the Assessor's Handbook.[14] It is those "instructions" which are the focus of CAA's regulatory challenge.

The Board states that there is a fundamental distinction drawn in Section 15606 between "rules and regulations" referred to in subdivision (c) and "instructions" referred to in subdivision (e). It also observes that subdivision (h) of Section 15606 gives the Board the power "to enforce compliance with Board rules and regulations . . . but does not extend that mandate to instructions."[15] According to the Board, this means:

"The Legislature thus recognized the distinction between regulations that are legally enforceable, and advisory instructions to assessors that do not have binding legal effect."[16]

The Board then reasons that OAL will essentially obliterate this statutory distinction if it determines the instructions found in the Assessor's Handbook are "regulations" subject to the APA. The Board's logic turns on the premise that its "instructions" have no binding effect. Therefore, if OAL were to find that the "instructions" were "regulations" and subject to the APA, this would be tantamount to a determination that the "instructions" were also *binding*. Since according to the Board, "instructions" were clearly not intended to be binding, an

adverse finding by OAL would render subdivision (e) of Section 15606 "meaningless."[17]

The Board further notes that the APA only applies to "statutes that confer quasi-legislative power upon state agencies." The statute which conferred quasi-legislative power on the Board is found in Section 15606. But the Board argues that *only subdivisions (c) and (g)* confer such power. Therefore, concludes the Board, if only subdivisions (c) and (g) confer quasi-legislative power, the APA can only apply to these subdivisions.[18] The unspoken conclusion the Board wishes the reader to draw is that the APA could not apply to the remainder of Section 15606 because it does *not* involve quasi-legislative rule-making power. That would include subdivision (e) which pertains to "instructions" found in the Board's Handbook.

The Board claims that its enabling legislation *preceded* the APA in time.[19] Therefore, the Board reaches the conclusion that any adverse determination by OAL with respect to the "instructions" would repeal subdivision (e) by implication. The Board takes the position that:

> "[I]t is not within the authority of the OAL to make this determination that certain provisions of the APA repeal by implication Government Code § 15606, subd. (e); rather, such a finding is within the purview of the Courts."[20]

The Board cites Government Code section 11346, which provides in part that:

> "This chapter [i.e. APA] shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

The clear intent of section 11346 is that the *APA* is not to be superseded by other legislation unless done so expressly. The Board, however, puts a reverse spin on this section by suggesting that *its enabling legislation* should not be superseded by the APA. It states:

> "*Similarly*, the APA, specifically, section 11340.5 of the Government Code should not be construed to supercede [sic] the provisions of section 15606, specifically subdivision (e) . . . ."[21]

The Board thus takes the position that any "instructions" it issues pursuant to subdivision (e) of Section 15606 are outside the scope of the APA and OAL's oversight. Review under the APA is to be limited only to state agency "regulations" purportedly promulgated pursuant to its quasi-legislative rulemaking authority. Anything else would be beyond the scope of the APA. That would include a review of the Board's "instructions," which the Board contends have not been adopted pursuant to its quasi-legislative rulemaking authority.

In reaching these conclusions, the Board appears to have relied upon several legal misconceptions. One is the notion that an OAL determination could repeal prior legislation by implication. Repeals of legislation can only be caused by subsequent legislation.[22] Repealing legislation is clearly beyond OAL's power because OAL is part of the executive, rather than the legislative branch of state Government.[23]

The notion that the Board's enabling legislation *pre-dated* the APA is incorrect. Section 15606 was enacted in 1951, as the Board correctly notes.[24] But the APA was enacted in 1947, not 1980 as the Board claims.[25] Section 11346 originally appeared as section 11420 of the Government Code. This fact was recognized by the court in *Engelmann v. State Bd. of Education* (1991). There, the court noted that:

> "The statute [Government Code section 11346] expressly states, 'the provisions of this article are applicable to the exercise of *any* quasi-legislative power conferred by *any* statute *heretofore or hereafter* enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by *any subsequent* legislation except to the extent that such legislation shall do so *expressly*. [Citation.] Thus, there is no problem of 'repeal by implication' – there is an express basis for applying the APA to ***every other statute***." [Emphasis in original in italics.] [Emphasis added in bold italics.][26]

A similar conclusion was reached in *Voss v. Superior Court* (1996).[27] The court found that:

> "Thus, another statute will supplant or limit the APA when two conditions are met. One, the other statute directing that the APA be supplanted or limited must have been enacted after 1947. [citation.] Two, *the other*

statute must disclose an express intention to supplant or limit the APA." [Emphasis added.][28]

Had the Legislature wished to exempt "instructions" issued by the Board from the APA, it could easily have done so. Government Code section 11342, subdivision (g), exempts from the definition of a "regulation" subject to the APA "legal rulings of counsel issued by the . . . State Board of Equalization." Noticeably absent from this exemption is the phrase "instructions of the Board." The fact that the Board is given an express exemption as to legal rulings of counsel, clearly reinforces the fact that every other Board activity (including its "instructions") is subject to review under the APA.

By claiming a review of its "instructions" is not within the authority of OAL, the Board is in essence saying that *its* enabling legislation repeals by implication the APA. Government Code section 11346, *Engelmann*, and *Voss* all make it clear that this is a legally untenable position.

Similar arguments were rejected by the California Supreme Court in *Tidewater Marine Western, Inc. v. Bradshaw* (1996).[29] There, the Court noted that:

> "Professor Michael Asimow, as an amicus curiae, suggests that interpretive regulations, such as the DLSE policy at issue here, are consistent with the APA because full APA rulemaking requirements apply only 'to the exercise of any *quasi-legislative* power.' (Gov. Code, § 11346, italics added.) Professor Asimow argues interpretive regulations are not 'quasi-legislative' ***because an agency does not adopt them pursuant to delegated legislative power, and they do not have the force of law***. . . .
>
> "We disagree. A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law. Professor Asimow argues that interpretive regulations are nonlegislative because, though courts should give them 'deference,' '[c]ourts need not follow them; [and] ***members of the public may choose to follow them but are not legally bound to do so***.' [Citation omitted.] To the extent, however, courts must *defer* to agency interpretations found in these regulations, they are rules of law, and the public disregards them at its peril." [Emphasis in original in italics.] [Emphasis added in bold italics.][30]

The Board suggests that the APA definition of a "regulation" is in conflict with Section 15606. The Board states: "In cases of seeming conflict in the provisions of statutes, the construction that would permit both provisions to stand should be employed."[31]

There is no conflict unless one accepts the notion that "instructions" issued by the Board *cannot* be "regulations" subject to the APA. The Board's argument is premised on the misconception that the existence or non-existence of a "regulation" is determined by its enabling legislation.

But that is clearly not the case. The definition of what is a "regulation" is found in the APA under Government Code section 11342, subdivision (g), not Government Code section 15606. In this respect, the Legislature clearly intended to "supersede" certain practices of state agencies. Government Code section 11340.5, subdivision (a), provides in part that:

> "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless . . . [it] has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

What is significant is that Section 11340.5 *does not* say:

> "No state agency shall issue, utilize . . . any guideline, criterion, etc. which is a regulation *as defined in that agency's enabling legislation* unless . . . [it] has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." [Emphasis added to illustrate the hypothetical.]

For all of the above reasons, OAL therefore concludes that APA rulemaking requirements generally apply to the Board.[32]

IV. ARE THE BOARD'S POLICIES "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or

> standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,[33] the California Court of Appeal upheld OAL's two-part test[34] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a "regulation" subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, . . .*

> 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*[35] [Emphasis added.]"

Two California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has [already] established . . . ."[36] But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."[37]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)[38] held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.[39] Statutes may legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

A. DO THE CHALLENGED POLICIES CONSTITUTE "STANDARDS OF GENERAL APPLICATION"?

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.[40]

A review of the policies in question clearly indicates that they are standards of general application. With respect to the policy involving residential use of religious property, the Assessors' Handbook Section 267 states:

> "**A Single Statewide Standard Applies To All Property Used for Residential Purposes"**[41]

The exemption for multispecialty clinics is also applied on a state-wide basis.[42]

Having concluded that the policies in question are standards of general application, OAL must consider whether they meet the second prong of the two-part test.

B. DO THE POLICIES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE BOARD OR GOVERN ITS PROCEDURE?

1. Background

The Board takes the position that the two challenged policies found in the Assessors' Handbook are not "regulations." It advances the following basic arguments.

1) The Handbook and the policies it contains are "instructions" as opposed to "regulations."

2) The Handbook is not binding on the Assessors, and they are free to disregard its provisions.

3) The policies in question merely explain and discuss previous adjudicatory decisions or case law.[43]

2. Non-Binding Policies or Instructions

The Board argues that "[t]he essential issue in determining whether an instruction is a regulation as defined in the APA is whether the instruction is enforceable."[44] It also notes that the assessors are not required to follow the instructions found in the Handbook. Since the Assessors' Handbook is not binding, the Board concludes that it cannot contain regulations.[45]

The manner in which the Board characterizes its Handbook is, however, not dispositive. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

> ". . . [The] Government Code . . . [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it*. . . . [Emphasis added.]"[46]

In this respect, enforceability is not the linchpin for determining whether or not a "regulation" exists under the APA. The Legislature enacted a much broader definition of a "regulation" than the one advocated by the Board. Government Code section 11340.5, subdivision (a), requires that the following types of "regulations" be adopted pursuant to the APA:

> "[A]ny guideline, criterion, bulletin, manual, instruction, order, standard of general application. . . ."

Nothing is said about whether any of these categories of "regulations" must be binding. Government Code section 11340.5, subdivision (a), provides in part that:

> "No agency shall *issue*, *utilize*, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, . . . or other rule, which is a regulation as defined in subdivision (g) of Section 11342, unless . . . [it] has been adopted [pursuant to the APA]."

By using the terms "issue" and "utilize" apart from "enforce" or "attempt to enforce," section 11340.5, subdivision (a), makes clear that a rule need not be binding or enforceable in order to be subject to the APA.[47]

Moreover, Government Code section 11342, subdivision (g), *already* exempts from the definition of a "regulation" subject to the APA "legal rulings of counsel issued by the . . . State Board of Equalization." The clear implication is that everything else the Board issues can be reviewed by OAL to determine if the APA should apply.

The Board, however, reasons that the penalty for not complying with the APA is "that the regulation may be declared to be unenforceable or invalid."[48] The unstated presumption here is that only "binding" or "enforceable" regulations can be declared to be "unenforceable" or "invalid." Put another way, if a "regulation" is not "binding" in the first instance, it makes no sense for it to subsequently be

declared "unenforceable" for failure to comply with the APA. The Board then uses this principle in support of its argument that only *binding* instructions can be considered regulations subject to the APA.[49]

The Board's argument confuses *legal* enforceability with whether *in fact* the agency enforces the particular rule. The two concepts are not the same. A determination by either OAL or a court that a "regulation" is *legally* unenforceable does not depend on whether the regulation was *in fact* enforced by the agency.

In *Union of American Physicians & Dentists v. Kizer* (1990),[50] the agency argued unsuccessfully that its documentation requirements were not subject to the APA because they "were 'simply informational in nature and [did] not seek to substantially regulate behavior.'" The California Court of Appeal rejected this argument, noting that agency rules which do no more than implement, interpret, and make specific the law enforced or administered by the agency require the promulgating agency to comply with the APA.[51]

Similar arguments were also rejected by the Court of Appeal in *Grier v. Kizer*. There, the court noted that:

> "Nonetheless, the Department argues the provider is not required to do anything differently when the Department uses probability sampling to prove an over-payment than it would be required to do in a full scale audit. . . . . Further, whether a regulation requires affirmative conduct by an affected party is not dispositive. In *Stoneham v. Rushen*, supra, 137 Cal.App.3d at page 736, 188 Cal.Rptr. 130, the adoption of a standardized scoring system to determine an inmate's classification invoked the APA because it was 'a rule of general application significantly affecting the male prison population', although it does not appear the new system imposed an additional burden on the inmates."[52]

The Board, however, cites the following language from *Prudential Insurance Co. of America v. City and County of San Francisco* (1987) in support of its position that the Assessors' Handbook is not subject to the APA:

> "However, the handbooks do not contain the regulations, nor do they possess the force of law. They represent 'merely the opinions of the State Board staff, and [have] no binding legal effect on boards, assessors, or taxpayers.'"[53]

In the opinion of OAL, the *Prudential* decision does not support the Board's position. The court was faced with a conflict which had arisen between the Board's *duly adopted regulations* and the Handbook. The court held that "in any conflict between the handbooks and the regulations, the latter must govern."[54]

The fact that the *Prudential* court recognized that the Handbook had no "binding legal effect" adds nothing to the issue of whether its contents can constitute "regulations" which are subject to the APA. Put another way, *Prudential* stands for the proposition that the Handbook has "no binding legal effect." It does not address the question of whether policies or instructions issued by an agency, having no binding legal effect, are nonetheless "regulations" subject to the APA.

As discussed earlier, the issue of whether a rule has "binding legal effect" is not dispositive. Instead:

> "Whether the action of a state agency constitutes a regulation does not depend on the designation of the action, but rather on its *effect and impact on the public*." [Emphasis added.][55]

The potential impact of the Assessors' Handbook appears to be significant. Its contents are couched in language which strongly implies the Board intends its policies to be applied uniformly throughout the State. The Handbook states that:

> "The Board believes that the exemptions, and the exclusive use test, should be applied ***uniformly*** whether it is the college exemption or the welfare exemption that is being sought. Use of a uniform statewide standard is appropriate."
>
> * * * *
>
> "In summary, there is a single uniform statewide standard to be used in determining whether the welfare exemption applies to property owned and used by qualified organizations for housing and related facilities. This single standard is to be utilized whether the housing provided by the organization constitutes property used exclusively as a facility incidental to and reasonably necessary for the accomplishment of the exempt purposes of the organization pursuant to section 214(a), or as housing for employees which is institutionally necessary for the operation of the organization pursuant to section 214(i)." [Emphasis in original in italics.][Emphasis added in bold italics.][56]

The Assessors' Handbook can also have significant impact in litigation between taxpayers and asssessors. "It is well established that assessor's handbooks are subject to judicial notice by the courts."[57] The Assessor's Handbook has been accorded "great weight" in at least one case, where its contents were quoted at length by the court.[58] In at least two cases, parties either cited or relied on information contained in Board handbooks for support of their positions.[59] In another, the court even mistakenly characterized the assessors' handbook as containing binding regulations.[60]

The Board emphasizes that the assessors are free to reject the standards enunciated in the Assessors' Handbook, and, in fact, have done so.[61] This argument, however, ignores the impact on the taxpayer of being confronted with conflicting exemption standards. The taxpayer's decision to legally challenge an assessment could be impacted by the existence of conflicting standards found in the Handbook. Evidence of this problem has already been furnished by the rulemaking petition submitted by the Church of Jesus Christ of Latter-day Saints. This request was triggered in large part by CAA's position recommending that Assessors not follow the instructions concerning the housing exemption found in the Assessors' Handbook.[62] The Church noted in its letter that:

> "The position of the Assessors has continued the controversy and the resultant uncertainty for our Church. This has become a classic situation in which the State Board should clarify the application of the law through a regulation, which would be binding on all parties."[63]

Thus, it is clear that the mere existence of a Handbook policy had such an adverse impact that it caused a major religious organization to petition for the adoption of a regulation to clarify the situation. It also illustrates the type of problem which can arise when Board policies are not adopted as regulations pursuant to the APA. For these reasons, OAL finds no merit to the Board's argument that the challenged policies are exempt from the APA because they are non-binding or unenforceable.

3. <u>The Multispecialty Clinic Exemption</u>

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in a "statutory scheme which the Legislature has [already] established . . . ."[64] But "to the extent [that] any of the

[agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."[65]

In a previous determination, we stated:

> "If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable 'interpretation,' that rule is not quasi-legislative in nature – no new 'law' is created."[66]

The Board relies on these principles with respect to the multispecialty clinic exemption. It claims that:

> "The multispecialty clinic portion of the Handbook summarizes applicable statutory provisions and a Memorandum Opinion of the Board."[67]

The Board also cites *Tidewater Marine Western, Inc. v. Bradshaw* for the proposition that interpretations that arise in the course of case-specific adjudications are not regulations.[68]

The multispecialty exemption arose out of a desire to expand the scope of the property tax exemption available to hospitals in Revenue and Taxation Code Section 214.[69] Consequently, Section 214.9 was added by the Legislature. It provides in part that:

> "For the purposes of Section 214, a 'hospital' includes an outpatient clinic, whether or not patients are admitted for overnight stay or longer, . . . where the clinic is a nonprofit multispecialty clinic of the type described in subdivision (l) of Section 1206 of the Health and Safety Code, so long as the multispecialty clinic does not reduce the level of charitable or subsidized activities it provides as a proportion of its total activities."

Health and Safety Code section 1206, subdivision (l), in turn, describes these clinics in the following terms:

> "A clinic operated by a nonprofit corporation exempt from federal income taxation . . . , that conducts medical research and health education and provides health care to its patients through a group of 40 or more physicians and surgeons, who are independent contractors representing not

less than 10 board-certified specialties, and not less than two-thirds of whom practice on a full-time basis at the clinic."

a. <u>The St. Jude Case</u>

The Board's current policy originated with a case involving St. Jude Heritage Health Foundation. St. Jude operates multiple clinical facilities in Southern California. It sought an exemption from the Board under Section 214.9. No single site had 40 physicians representing not less than 10 specialties as required by the statute. Thus, none of the sites could qualify individually. If, however, all the sites were aggregated, St. Jude could qualify.[70]

The issue before the Board was whether to apply the statutory requirements on a per-site basis or in the aggregate.[71] In 1997, the Board determined that the clinics operated by St. Jude could be treated in the aggregate.[72] Subsequent to the St. Jude decision, the Board incorporated the policy of aggregating clinics for purposes of qualifying for the multispecialty clinic exemption into the Assessors' Handbook.

The Board and several of the commentors state that the multispecialty policy is merely a recitation of the case-specific St. Jude decision. There is, however, nothing case-specific about the way this decision was written or applied by the Board. In its decision, the Board stated:

> "It is clearly our responsibility, for property tax welfare exemption purposes, *to interpret section 214.9 together with Health and Safety Code section 1206, subdivision (l).*" [Emphasis added.][73]

Nor does the Board's policy enunciated in the Assessors' Handbook Section 267 confine itself to a simple recitation of the St. Jude case. It takes a case-specific outcome and transforms it into a suggested standard of general application. The Handbook states in general terms that:

> "Multiple clinic sites operated as a unified integrated clinic may be treated as a single clinic for purposes of section 214.9 based on a recent Board decision."[74]

After describing the St. Jude decision, the Handbook goes on to provide:

> "Accordingly, the requirement that a clinic maintain a group of 40 or more physicians representing not less than 10 specialties and not less than two-thirds of whom practice on a full-time basis, may be met by aggregating the group of physicians at all of a claimant's clinic sites. The nonprofit organization should provide information addressing the above requirements when filing its exemption claim for multispecialty clinics."[75]

Clearly, there is nothing "case-specific" about this language. In this respect, language in *Tidewater* is instructive. There, the Division of Labor Standards Enforcement ("DLSE") had issued wage orders pertaining to workers engaged in oil drilling in the Santa Barbara Channel. The California Supreme Court found that:

> "The policy at issue in this case was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment. In addition, the policy *interprets the law that the DLSE enforces by determining the scope of the IWC wage orders*. [just as the Board interpreted the scope of the term "clinic"] Finally, the record does not establish that the policy was, either in form or substance, merely a restatement or summary of how the DLSE had applied the IWC wages orders in the past. Accordingly, the DLSE's enforcement policy appears to be a regulation within the meaning of Government Code section 11342, subdivision (g), and therefore void because the DLSE failed to follow APA procedures." [Emphasis added.][76]

b. <u>The Meaning of the Term "Clinic"</u>

The Board claims its actions have not extended the scope of Section 214.9. The Board, however, apparently fails to appreciate the impact of its own actions. Both sections 214.9 and 1206, subdivision (l), refer to a "clinic." Is this a single clinic or a multiple group of clinics? The Board answered that question in its Handbook. In order to do so, it had to either *interpret the term "clinic" or make it more specific or both.*

Evidence of the interpretive nature of the Board's policy is found in comments submitted on behalf of St. Jude. The commenter states that:

> "[T]here are no court decisions discussing or interpreting the multispecialty clinic provisions of Section 214.9, and because of that absence of authority Section 214.9 is, . . . ambiguous and susceptible to more than one interpretation.[77]

The Board's own staff indicated in their analysis that:

> "[S]taff has interpreted Section 214.9 to require each and every clinic rather than clinics as a group or unit to meet the definition of a nonprofit multispecialty clinic in Section 1206, subdivision (l).
>
> Review of applicable authorities indicates that there are no statutory provisions, regulations or court cases which specify how to apply Section 214.9 and Health and Safety Code Section 1206, subdivision (l) for welfare property tax exempt purposes. However, the *narrower interpretation* which would require each clinic to qualify as a multispecialty clinic finds support in the statutory language of Section 214.9 and Section 1206, subdivision (l), in well-settled principles of statutory construction, in the circumstances of the legislation, and in general public policy with respect to the welfare exemption." [78]

The Board's staff also cited a letter from the Department of Health Services. It stated that:

> "'The Department of Health Services acknowledges the tax exempt status of St. Jude Heritage Foundation as determined by the federal government. However, after extensive review by the Department, we have determined that none of the clinic sites alone meet these requirements, and this is a requirement for each clinic to be exempt.'"[79]

The above passages clearly demonstrate that the definition of a "clinic" was susceptible to more than one interpretation. Responsible state agencies disagreed on the scope of this term. The Board interpreted that term in Assessor's Handbook Section 267. The Board's policy also went beyond the particulars of the St. Jude decision. For these reasons, its policy meets the definition of a "regulation" within the meaning of Section 11342, subdivision (g), of the Government Code.

4. The Religious Housing Exemption

In Revenue and Taxation Code section 214, subdivision (i), the Legislature provided the following property tax exemption.

> "Property used *exclusively* for housing and related facilities for employees of religious, charitable, scientific, or hospital organizations . . . shall be deemed to be within the exemption provided for in subdivision (b) of Sections 4 and 5 of Article XIII of the California Constitution and this section to the extent the residential use of the property is *institutionally necessary* for the operation of the organization." [Emphasis added.]

In 1990, the subject of this property tax exemption was addressed in an OAL determination.[80] At that time, the Assessor's Handbook contained the following policy.

> "The property must be used exclusively for religious, hospital, or charitable purposes and be in such use on the lien date.
>
> * * * *
>
> Housing owned by a church and occupied by members of the church is not exempt [from property taxation] when the members otherwise live conventional nonreligious lives, e.g., full-time students having outside employment. Similarly, conventional residences of ministers, priests, and rabbis have never been exempted because they are used for their private residential purposes and not religious purposes exclusively."[81]

The Board's policy has changed significantly since that time. When the Board decided to initiate formal rulemaking procedures in 1999, it explained the evolution of this policy in its Final Statement of Reasons.

> "*Interpreting* this judicial precedent narrowly, the Board, Board staff and county assessors, historically, have considered most housing of qualifying nonprofit organizations to be ineligible for exemption, at least in part, on the grounds that it was used primarily for private residential purposes rather than used exclusively for exempt (religious, hospital, scientific, charitable) purposes.

> . . . . In 1997, . . . , the Board determined that it should reconsider its past policies and interpretations. This determination was also motivated by the realization that the evolving view of the courts favored exemption in virtually every housing case that came before them.
>
> . . . . It would appear that the application of a strict standard, rather than a strict, but reasonable standard by the Board and the assessors in their interpretation of exemption law statutory and constitutional provisions, as well as judicial decisions, had resulted in the exemption of very few housing properties of qualified nonprofit organizations.
>
> . . . . In October 1998, the board approved publication of an updated version of its advisory Assessors' Handbook, Section 267, Welfare, Church, and Religious Exemptions." [Emphasis added.] [82]

The Board thus acknowledged several things. First, the Handbook involves much more than a mere recitation of case law. Essentially the same cases *with the same holdings* are quoted in both the Board's old and new Handbooks. What is different is the manner in which the Board chose to interpret them. It changed for a "*strict standard*" to a "*strict, but reasonable standard*." [Emphasis added.]

The Board, however, repeatedly maintains that the Handbook is merely restating the facts and law of court decisions which have addressed this issue. The Board concludes that "the Handbook does not 'interpret' or 'implement' this body of judicial law or the provisions of section 214."[83]

To the extent that the Handbook merely restates the holdings of these cases, its contents do not constitute "regulations" subject to the APA. Similarly, a recitation by the Board of the factual circumstances presented in those cases would also not constitute a "regulation."[84]

The Handbook, however, goes beyond a recitation of case-specific examples. It essentially synthesizes either their holdings, language or dicta and creates a new standard for determining residential exemptions. The Board even explained why this was necessary in the Handbook.

> "Prior to the enactment of section 214(i), the Courts applied two similar but slightly divergent statements of the standard for the exemption. The first is that the housing must be *incidental to an reasonably necessary for* the

> accomplishment of the exempt purposes of the organization. The second, sometimes applied by itself and sometimes in conjunction with the first standard, is the housing be *institutionally necessary* . . . for the operation of the organization. This divergence in terms has caused confusion and disputes. The Board has resolved this confusion by determining that the terms *incidental to and reasonably necessary for* and *institutionally necessary* are identical and interchangeable, and no distinctions in application of the welfare exemption should be based on any difference or divergence between the terms. For purposes of the welfare exemption, the term *institutionally necessary* means and includes *incidental to and reasonabl[y] necessary for* and vice versa." [Emphasis in original.][85]

This policy was to be no mere recitation of case law.

> "In summary, there is a single uniform statewide standard to be used in determining whether the welfare exemption applies to property owned and used by qualified organizations for housing and related facilities. This single standard is to be utilized whether the housing provided by the organization constitutes property used exclusively as a facility *incidental to and reasonably necessary for* the accomplishment of the exempt purposes of the organization pursuant to section 214(a), or as housing for employees which is *institutionally necessary* for the operation of the organization pursuant to section 214(i)." [Emphasis in original.][86]

The Board acknowledged a lack of uniformity in the case law concerning the standard for the religious housing exemption.[87] The Board also acknowledged that it has created a "single *uniform* statewide standard." [Emphasis added.] It did this by equating the terms "*incidental to and reasonably necessary*" and "*institutionally necessary."* This fits the definition of a "regulation" found in section 11342, subdivision (g), of the Government Code. The Board has "interpreted" or "made specific" the law it enforces.

In doing so, the Board also has interpreted Revenue and Taxation Code section 214, subdivision (i). It requires that "residential use of the property [must be] *institutionally necessary* for the operation of the organization." The Board had interpreted the term "institutionally necessary" to also mean "*incidental to and reasonabl[y] necessary for*." Thus, the Board has added to or made more specific the terms of its enabling legislation.

Moreover, the leading cases were all decided prior to the time the Board issued its 1985 version of its Handbook. The standard enunciated in that edition of the Handbook was that the property had to be "used *exclusively* for religious, hospital, or charitable purposes." "Exclusive" use is no longer required. The 1998 edition of the Handbook includes a number of "[f]actors" which are to be considered in determining eligibility. Factor number three provides in part that:

> "Is the housing, ***in addition to providing living quarters for the employee or other person,*** used regularly for activities in furtherance of the exempt purposes of the organization, such as meetings, . . . counseling of members, study and training in the purposes, philosophies, etc. of the organization or contemplation and prayer? *If so, the housing is institutionally necessary for the operation of the organization*." [Emphasis in original in italics.] [Emphasis added in bold italics.][88]

Thus, at two different time periods, the Handbook enunciated two significantly different interpretations of essentially the same body of case law. The Handbook, therefore, cannot be characterized as merely a restatement of the facts or holdings of those cases. It includes an interpretive gloss added by the Board.

For all of the above reasons, OAL finds that both of the challenged policies set forth in the 1998 edition of the Assessors' Handbook Section 267 are "regulations" and subject to the APA.

V. DO THE CHALLENGED DIRECTIVES FOUND TO BE "REGULATIONS" FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly*[89] exempted by statute.[90] In *United Systems of Arkansas v. Stamison* (1998),[91] the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of impliedly exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

> "*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language*. (See, e.g., Gov. Code, section

16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"[92]

Express statutory APA exemptions may be divided into two categories: special and general.[93] *Special* express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of a *special* express exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of a *general* express exemption is Government Code section 11342, subdivision (g), part of which exempts "internal management" regulations of all state agencies from the APA.

A. DO THE CHALLENGED DIRECTIVES FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

The Board does not contend that any special statutory exemption applies. Our independent research having also disclosed no special statutory exemption, we conclude that none applies.

B. DO THE CHALLENGED DIRECTIVES FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?

The Board does not contend that any general express exemption applies. Our independent research having also disclosed no general express statutory exemption, we conclude that none applies.

Since the challenged rules do not fall within any express statutory exemption from the APA, OAL concludes that they are without legal effect because they were not adopted in compliance with the APA.

CONCLUSION

For the reasons set forth above, OAL finds that:

1. The APA is generally applicable to the Board.

2. The Board of Equalization has issued or utilized policies which have general applicability and make specific the terms of the California Revenue and Taxation Code;

3. No general exceptions to the APA requirements apply to the challenged policies;

4. The policies established by the Board of Equalization, except those parts which restate existing law, are invalid unless adopted as regulations pursuant to the APA.

DATE: March 13, 2000

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ENDNOTES

1. This request for determination was filed by Bruce Dear, Placer County Assessor on behalf of the California Assessors' Association, 2980 Richardson Driver, Auburn, Ca. 95603, (530) 889-4309. The Board of Equalization responded to the request and was represented by Timothy W. Boyer, Chief Counsel, P.O. Box 942879, 450 N Street, Sacramento, Ca. 94279-0083, (916) 323-3387.

2. This determination may be cited as "**2000 OAL Determination No. 6.**"

   Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

   Government Code section 11340.5, subdivision (d), provides that:

   > "Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

   Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.

4. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 and 11349.1.)

5. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

   " '*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

> (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
>
> (2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]"

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)—now subd. (g)—yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a l996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (l996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer.*

6. *OAL Determinations Entitled to Great Weight in Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that:

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration*.[*Id*.; emphasis added.]"

See also *Union of American Physicians & Dentists v. Kizer* (l990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4,** California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

7. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400, and *Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*. [Emphasis added.]"

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

8. Government Code section 15606.

9. Request for Determination, dated February 16, 1999, p. 1.

10 . Letter of Kirton & McConkie, dated June 24, 1999.

11. Title 18, CCR, section 137. The full text of the regulation is set forth below.

"(a) Housing and related facilities owned and used by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific or charitable purposes is eligible for the welfare exemption from property taxation as provided in Revenue and Taxation Code section 214. A single uniform statewide standard shall be used to determine whether the welfare exemption applies to housing and related facilities owned and used by qualified organizations. The standard is whether the use of the property by the organization for housing and related facilities is a use that is incidental to and reasonably necessary for the accomplishment of the exempt purposes of the organization. For purposes of applying the uniform statewide standard, the phrase 'Use of property that is incidental to and reasonably necessary for the accomplishment of the

exempt purposes of the organization' includes the use of property that is institutionally necessary for the operation of the organization as provided in subdivision (i) of section 214 of the Revenue and Taxation Code.

(b) For purposes of determining whether property used for housing and related facilities is eligible for the welfare exemption, the terms 'incidental to and reasonably necessary for' and 'institutionally necessary' are identical and interchangeable: the term 'institutionally necessary' means and includes 'incidental to and reasonably necessary for' and vice versa. No distinctions in application of the welfare exemption to housing and related facilities shall be based on any difference or divergence between the terms.

(c) For purposes of determining eligibility for the welfare exemption, it is the use of the housing and related facilities by the organization owning the property that is to be considered, not the use by the occupants. If the organization's use of the property is incidental to and reasonably necessary for the accomplishment of the organization's exempt purposes, the property is eligible for exemption. The occupant's use for personal or residential purposes is secondary to the organization's primary exempt purpose and shall not disqualify the property from exemption either in whole or in part.

(d) The location of the property in relation to other property owned and used by the exempt organization is irrelevant to the application of the exemption. It is the use of the property by the organization which is the determining factor. The fact that the housing is located on property in a remote area may be considered in determining whether the housing is incidental to and reasonably necessary for the operation of the organization.

(e) EXAMPLES: The following examples illustrate the application of the welfare exemption to housing and related facilities.

Example No. 1

The two-story building with seven completely-furnished apartments is used exclusively to provide temporary low-cost housing to missionaries, clergy, other religious workers and their families on furlough status while in the United States. The articles of incorporation of the nonprofit religious corporation which owns and operates the property provide that its purpose is to provide housing for missionaries, clergymen, other religious workers and their families who work in establishing and furthering its religious purposes throughout the world. This housing is exempt as a facility incidental to and reasonably necessary for the accomplishment of the church's religious and charitable purposes.

Example No. 2

The property of a private school is used to provide board and housing to students. Although most of the school's students were day students, some students relied upon the school for board and lodging. These services provided by the school are reasonably related to the exempt educational activity, and are an exempt use of the property within the school's educational purpose.

Example No. 3

Property owned by a nonprofit corporation is used for housing and related facilities for persons who assemble two weeks each year for purposes of religious instruction and worship. The residential facilities are exempt as within the organization's religious purpose. Housing for caretakers or maintenance workers required to reside at the religious conclave facility is exempt as institutionally necessary.

Example No. 4

A nonprofit religious organization owns housing which it provides to its ministers and their families. Organizational documents require the church to provide housing as part of a system that allows the organization flexibility in assigning the clergy, aids in recruiting and keeping the clergy and provides the clergy with privacy and respite. The property also is used regularly for church functions such as youth meetings and organizational committee meetings. The church's use of its property to provide housing for its clergy is exempt as reasonably necessary for the furtherance of its religious purpose.

Example No. 5

The primary missionary activity of a nonprofit religious organization is to publish and disseminate its religious literature to the general public. The organization owns a complex consisting of a temple and six apartment buildings that provide work areas for about 250 devotees, about one-half of whom are involved in the publishing and distribution of the organization's religious books and magazines. The work areas are frequently used at night as sleeping areas since most of the devotees live in the rooms in which they work. The devotees follow a seven-hour daily regimen of communal and individual daily prayers, meditations, chanting, and attendance at temple services and observe a strict diet which necessitates living in the temple complex. Property used for housing the devotees in the temple complex is exempt as reasonably necessary for the fulfillment of the organization's religious objectives.

Authority: Government Code Section 15606(c).

References: Sections 214, 214.01, 214.1, 214.2, 254, 254.5, 255, Revenue and Taxation Code; Article XIII, Sections 4(b) and 5, California Constitution."

12. Comments concerning CAA's regulatory challenge were received from the following individuals, agencies or organizations:

    1) Sutter County Assessor's Office;

    2) William A. Minor;

    3) Sutter Health Foundation (submitted by McDonough, Holland & Allen);

    4) St. Jude Heritage Health Foundation (submitted by McCutchen, Doyle, Brown & Enersen);

    5) The California Catholic Conference;

    6) Facey Medical Foundation of Granada Hills (submitted by Bewley, Lassleben & Miller); and

    7) The Church of Jesus Christ of Latter-Day Saints (submitted by Kirton & McConkie).

    See: Letter from Sutter County Assessor's Office, dated Dec. 1, 1999; Letter from William A. Minor, dated Dec. 12, 1999; Letter from Sutter Health Foundation (submitted by McDonough, Holland & Allen), dated Dec. 13, 1999; Letter from St. Jude Heritage Health Foundation (submitted by McCutchen, Doyle, Brown & Enersen), dated Dec. 13, 1999; Letter from The California Catholic Conference, dated Dec. 13, 1999; Letter from Facey Medical Foundation of Granada Hills (submitted by Bewley, Lassleben & Miller), dated Dec. 13, 1999; and Letter from The Church of Jesus Christ of Latter-Day Saints (submitted by Kirton & McConkie), dated Dec. 13, 1999.

13 Government Code section 11342, subdivision (a).

14. See *Assessors' Handbook Section 267*, Forward ("the Board shall issue *instructions*, such as those set forth in this handbook section").

15. Response, p. 4.

16. *Id*.

17. *Id*.

18. *Id*.

19. *Id*.

20. *Id*. at 5.

21. Response, p. 4. Tellingly, the Board did not point to a comparable provision in its enabling legislation regarding implied repeals by the APA. Put simply, the Board cited no legal authority to support the novel proposition that legislative provisions made specifically applicable to the APA should also be applied to its own enabling statute.

22. See 1A Sutherland, *Statutory Construction* (5th Ed. 1993), Section 23.03, p. 322 ("The constitutional authority to repeal statute law resides exclusively with the legislatures.").

23. *Id*. See also Government Code section 11340.1, subdivision (a) ("It is the intent of the Legislature that while the Office of Administrative Law will be part of the executive branch of state government, that the office work closely with, and upon request report directly to, the Legislature . . . .").

24. Section 15606 was "[a]dded by Stats 1951, Ch. 655 § 30." Response, p. 4, footnote 3.

25. Response, p. 4. Section 11420 was added by Stats 1947, ch. 1425, section 4.

26. 2 Cal.App.4th at 59, 3 Cal.Rptr.2d at 272.

27. 46 Cal.App.4th 900, 54 Cal.Rptr.2d 225.

28. 46 Cal.App.4th at 909, 54 Cal.Rptr.2d at 229. Citing, *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59, 3 Cal.Rptr.2d 264.

29. 14 Cal.4th 557, 59 Cal.Rptr.2d 186.

30. 14 Cal.4th at 574 – 75, 59 Cal.Rptr.2d at 196 - 97.

31. Response, p. 5.

32. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).

33. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a l996 California Supreme Court case stated that it "disapproved" of Grier in part. *Tidewater*

Marine Western, Inc. v. Bradshaw (l996) 14 Cal.4th 557, 577. Grier, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (l997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (l973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (l997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

*Tidewate*r itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (l990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*

34. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, . . . slip op'n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*]."

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion—**1987 OAL Determination No. 10**—was published in California Regulatory Notice Register 96, No. 8-Z, February 23, l996, p. 292.

35. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (l998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.

36. 2 Cal.App.4th 47, 62, 3 Cal.Rptr. 264, 274 - 75.

37. *Id.*

38. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

39. *Id.*

40. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

41. Assessors' Handbook Section 267, p. 59.

42. The Board's policy is for multispecialty clinics which are covered by Revenue and Taxation Code section 214.9 and Health and Safety Code section 1206, subdivision (l). Both these statutes apply on a state-wide basis.

43. Response, pp. 1 – 2.

44 . *Id*. at 5. Similar arguments were raised by the Board in connection with two prior regulatory determinations: **1986 OAL Determination No. 3** CANR 86, No. 24-Z, June 13, 1986 and **1990 OAL Determination No. 9,** CRNR 90, No. 22-Z, June 1, 1990. The latter determination involved the property tax welfare exemption for religious property used for residential purposes. In both instances, OAL found that the Board's policies were subject to the APA.

45. Response, p. 6.

46. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

47. An extensive discussion on why it is not necessary for "regulations" to be "binding" in order to be subject to the APA is contained in **1999 OAL Determination No. 17**, CRNR 99, No. 33-Z, Aug. 13, 1999, p. 1575, 1579 – 84. OAL Docket No. 98-001, pp. 10 – 20 in typewritten version.

48. Response, p. 5.

49. *Id*. at 5 - 6.

50. 223 Cal.App.3d 490, 272 Cal.Rptr. 886.

51 . 223 Cal.App.3d at 502, 272 Cal.Rptr. at 892.

52. 268 Cal.Rptr. at 253.

53. 191 Cal.App.3d at 1155, 236 Cal.Rptr. at 877, citing Kenneth A. Ehrman and Sean Flavin, 1 *Taxing California Property* (3rd Ed. 1999), Section 16.05.

54. 191 Cal.App.3d at 1155, 236 Cal.Rptr. at 877. *Prudential* is another illustration of the impact which can be caused by having conflicting legal standards. The conflict was between the Board's regulations and its handbook.

55. *Winzler & Kelly v. Dept. of Industrial Relations*, (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744.

56. Assessors' Handbook Section 267, pp. 58 – 59.

57. *Hunt-Wesson Foods, Inc. v. County of Alameda* (1974) 41 Cal.App.3d 163, 180, 116 Cal.Rptr. 160; *Gallagher v. Boller* (1964) 231 Cal.App.2d 482, 488 – 489, 41 Cal.Rptr. 483 (Board appeared as amicus, indicating it had prepared the Handbook "as a basic guide for use by assessors"); *Bank of America v. County of Los Angeles* (1964) 224 Cal.App.2d 108, 114, 36 Cal.Rptr. 413.

58. *Cox Cable San Diego, Inc. v. San Diego County* (1986) 185 Cal.App.3d 368, 377, 229 Cal.Rptr. 839.

59. *Firestone v. County of Monterey* (1990) 223 Cal.App.3d 382, 392, 272 Cal.Rptr. 745. In *Glidden Company v. County of Alameda* (1970) 5 Cal.App.3d 371, 85 Cal.Rptr. 88, the taxpayer unsuccessfully litigated relying on property tax ratio contained in a handbook entitled "The Appraisal of Equipment and Inventory" which had been promulgated by the Board.

60. *Carlson v. Assessment Appeals Board* (1985) 167 Cal.App.3d 1008, 1012, 213 Cal.Rptr. 555. This case was discussed by Kenneth A. Ehrman and Sean Flavin in 1 *Taxing California Property* (3rd Ed. 1999), Section 16.05.

61. Response, pp. 6, 7. The Board also cited Revenue and Taxation Code section 254.5, subdivision (b) which provides in part that:

> "The assessor may deny the claim of an applicant the board finds eligible but may not grant the claim of an applicant the board finds ineligible."

62. Church of Jesus Christ of Latter-Day Saints Petition to Board of Equalization, Letter of Kirton & McConkie, dated February 16, 1999, p. 2.

63 . *Id*. at 2.

64. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274.

65. 2 Cal.App.4th at 62, 3 Cal.Rptr.2d at 275.

66. **1986 OAL Determination No. 4** (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.

67. Response, p. 8.

68. Response, p. 8.

Although the *Tidewater* opinion does contain a significant discussion of quasi-judicial precedent decisions, this discussion appears to have been superseded by a subsequent statutory change. Several months after the opinion was filed, an express statutory exemption was codified in Government Code section 11425.60. It has the effect of legalizing the use of precedent decisions, if certain conditions are met.

The *Tidewater* court does not cite section 11425.60. Several portions of *Tidewater* might well have been drafted differently had the court taken the enactment of section 11425.60 into account. For instance, the following passage must be read with the knowledge that it appears to have been written *without* considering the significance of section 11425.60:

> ". . . [I]nterpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as *precedents* in similar subsequent cases. [citations] . . . Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases, . . . the agency is not adopting regulations. [Emphasis added.]" 14 Cal.4th at 571, 59 Cal.Rptr. 2d at 194 – 95.

The quoted passage likely cannot be reconciled with Government Code section 11425.60. *Tidewater* found that interpretations arising in the course of adjudicatory decisions were not "regulations." But section 11425.60 *created* an express APA exemption for adjudicatory decisions. Had precedent decisions been exempt from the APA prior to the enactment of section 11425.60, there would have been no need for enactment of this express statutory exemption. It supersedes prior statutory and decisional law, including the above-quoted language in *Tidewater*.

OAL's position since l986 has been that, absent an express statutory exemption from the APA, agency precedent decision systems violate the APA. Under the law as it existed until July 1, l997, a general rule developed in a quasi-judicial proceeding could not be used from that point on in similar factual settings in lieu of a duly adopted regulation unless the rule had first been adopted as a regulation.

An issuance of a rule of general application, first developed in a quasi-judicial proceeding, would violate Government Code section 11340.5. It would not matter if the decision were restated without commentary: the statement of the decision by itself contains a prospectively applicable standard of general application. However, the issuing agency could under section 11425.60 elect to designate it as a precedent decision. If this were done, the decision could be freely written up in departmental publications and could be used in lieu of a duly adopted regulation.

Even assuming the provision of *Tidewater* relied on by the Board were still good law, it would be of little avail. The *Tidewater* Court went on to say:

> "[I]f an agency prepares a policy manual that is no more than a restatement or summary, *without commentary*, of the agency's prior decisions in specific cases . . . the agency is not adopting regulations." [Emphasis added.] 14 Cal.4th at 571, 59 Cal.Rptr.2d at 194 - 95.

Both the Board's memorandum opinion and the ensuing policy enunciated in its Handbook added general comment concerning the St. Jude decision. In addition, that commentary indicated that the Board intended its decision to have general application to all multispecialty clinics.

69. *In the Matter of St. Jude Heritage Health Foundation,* Appeal No. WEC 97-005, Aug. 1, 1997, STAFF ANALYSIS AND RECOMMENDATION, p. 12.

70. *In the Matter of St. Jude Heritage Health Foundation,* Appeal No. WEC 97-005, Aug. 1, 1997, DECISION OF THE BOARD, p. 3.

71. *Id*. at 5.

72. *Id*. at 6.

73. *Id*.

74. Assessors' Handbook Section 267, p. 31.

75. *Id*.

76. 14 Cal. 4th at 572, 59 Cal.Rptr.2d at 195.

77. Letter of McCutchen, Doyle, Brown & Enersen, Dec. 13, 1999, p. 1.

78. Staff Analysis and Recommendation submitted in the matter of St. Jude Hospital, p. 10.

79. *Id*. at 14.

80. **1990 OAL Determination No. 9,** CRNR 90, No. 22-Z, June 1, 1990.

81. AH 267 (Assessors' Handbook), dated 12-85, pp. 31, 33.

82. Final Statement of Reasons, p. 4. (OAL Regulatory Action Number 99-1027-01S)

83. Response, p. 11.

84. See *Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 - 75 and *Tidewater Marine Western, Inc. v. Bradshaw* (l996) 14 Cal.4th 557, 571, 59 Cal.Rptr.2d 186, 194 - 195.

85. Assessors' Handbook Section 267, p. 58. Examples of leading cases applying the two standards referred to in the Assessors' Handbook are: *Serra Retreat v. County of Los Angeles* (1950) 35 Cal.2d 755, 221 P.2d 59 ("institutional necessity"); *Cedars of Lebanon Hospital v. County of Los Angeles* (1950) 35 Cal.2d 729, 221 P.2d 31 ("reasonably necessary"); *Fredericka Home v. County of San Diego* (1950) 35 Cal.2d 789, 221 P.2d 68 ("institutional necessity"); *House of Rest v. County of Los Angeles* (1957) 151 Cal.App.2d 523, 312 P.2d 392 ("incidental to and reasonably necessary"); *Saint Germain Foundation v. County of Siskiyou* (1963) 212 Cal.App.2d 911, 28 Cal.Rptr. 393 ("institutional necessity" and "reasonable incidental activity"); *Sarah Dix Hamlin School v. City and County of San Francisco* (1963) 221 Cal.App.2d 337, 34 Cal.Rptr. 376 ("reasonably related").

86. *Id.* at 59.

87. See description of some of the leading cases in endnote 85, *supra.*

88. Assessors' Handbook Section 267, p. 60.

89. The following agency enactments, among others, have been expressly exempted by statute:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

    c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1); emphasis added.)

    d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)

    In addition, there is weak case law authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA.

City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.

90. Government Code section 11346.

91. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.

92. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411

93. Cf. *Winzler & Kelly v. Department of Industrial Relations* (l981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).